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In the Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, AND THE CITY OF DETROIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	6
Conclusion	9

CITATIONS

Cases:	
Dugan v. *Rank*, 372 U.S. 609	9
City of Fresno v. *California*, 372 U.S. 627	9
Hawaii v. *Gordon*, 373 U.S. 57	9
Land v. *Dollar*, 330 U.S. 731	9
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	9
Mine Safety Appliances Corp. v. *Forrestal*, 326 U.S. 371	9
Scanwell Laboratories, Inc. v. *Shaffer*, 424 F.2d 859	8
Statute:	
Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, (33 U.S.C. (Supp. II) 1281 *et seq.*):	
Section 205	5
Section 205(a)	2, 6, 8
Section 207	2, 4, 5, 6, 8
Miscellaneous:	
118 Cong. Rec. H9122 (daily ed., Oct. 4, 1972)	8

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the courts of appeals (App. A, pp. 1A–34A)[1] is not reported. The opinion of the district court (App. E, pp. 59A–78A) is reported at 358 F. Supp. 669.

[1] Appendix references are to the combined appendix to the petitions in this case and the companion case of *Train* v. *Campaign Clean Water, Inc.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 23, 1974 (App. C, pp. 55A–56A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrator, acting at the direction of the President, has discretion under the grant program of Title II of the Federal Water Pollution Control Act Amendments of 1972 to control the rate of spending by making allotments to the states under Section 205(a) of less than the full amounts authorized by Section 207.

2. Whether an action to compel allotment is barred by the doctrine of sovereign immunity.

STATUTES INVOLVED

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (33 U.S.C. (Supp. II) 1281 *et seq.*) provide:

> *Sec. 205.* (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of

> constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.
>
> (b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

Title II of the Federal Water Pollution Control Act Amendments of 1972 ("the Act") creates a federal grant program by which the federal government undertakes to pay seventy-five percent of the cost of building approved sewage treatment plants. The granting of such funds takes place in several stages. First, the Congress authorizes appropriations for such grants. Then the Administrator makes allotments from the authorized amounts to the states pursuant to specified percentage formulas. The Administrator then obligates for qualified projects within the state out of each state's allotment. Finally, as grantees make expenditures on the approved projects, the sums due under the obligations are appropriated by the Congress and paid.

Sections 205 and 207 of the Act are directly involved in this case. Section 207 authorizes appropriations "not to exceed" $5 billion for fiscal year 1973, $6 billion for fiscal year 1974 and $7 billion for fiscal year 1975. Section 205 provides that the Administrator "shall allot" the sums authorized by Section 207 to the states. The Administrator has construed the statutes as empowering him to control the rate of spending by making allotments of less than the full amounts authorized by Section 207.

On November 28, 1972, the Administrator, acting pursuant to a direction of the President, allotted $2 billion for fiscal year 1973 and $3 billion for fiscal year 1974 (App. A, p. 7A). These actions are challenged in this litigation. On January 15, 1974, the Administrator, in an action not directly challenged here, allotted $4 billion out of the $7 billion authorized for fiscal year 1975.

On December 12, 1972, the City of New York filed a complaint in the United States District Court for the District of Columbia alleging that under Section 205 of the Act the Administrator is required to allot all sums authorized by Section 207—an additional $3 billion for 1973 and $3 billion for 1974. Plaintiff contended that the statutory phrase "shall allot" requires an allotment of the full amount (App. E, p. 60A). The Administrator responded that the phrase, when construed together with Section 207, means "shall allot [an amount] not to exceed" the amount authorized (App. E, p. 71A).

The district court held that the Act imposed a mandatory duty to allot (*id.* at 77A). The court of

appeals affirmed, holding that Section 205(a) imposes a mandatory duty on the Administrator to allot all sums authorized by Section 207 (App. A, p. 34A).[2]

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that the Administrator has no discretion to allot to the States less than the total amount authorized to be appropriated under the Act presents an important question that this Court should review. The Administrator has acted to reserve nine of the eighteen billion dollars authorized by the statute for future expenditure. The court of appeals' decision will require that the entire $18 billion be allotted immediately.

Although this case turns on an issue of statutory construction, the issue has important ramifications for the power of the Executive Branch to coordinate and control the federal government's spending process in light of the need for economic stability and the limitations on federal resources. This case is not one in which the Executive asserts a power to control the rate of expenditure in opposition to the wishes of Congress; it is, rather, a case in which courts have improperly cut into and endangered a discretion Congress intended the President to have.

The same issue is pending in cases before the Fifth Circuit (*State of Texas* v. *Train*, Nos. 73–3965 and 73–4026, Administrator's brief filed); the Seventh Circuit (*Anthony R. Martin-Trigona* v. *Train*, No. 73–1794, case briefed, not argued); and the Eighth Circuit (*State of Minnesota* v. *Train*, No. 73–1446, argued *en banc* on February 13, 1974).

[2] The order of the court of appeals has been stayed by that court pending disposition of this petition.

2. Review by this Court at this time is appropriate due to the possibility that allotments once made cannot be withdrawn, even if the Administrator's position is ultimately sustained on the merits, because of the reliance by the states on available allotments in their planning process. The court of appeals explained the extensive legislative history recognizing the Administrator's power to control the rate of spending as control over the rate of spending at the obligation stage of the program (App. A, pp. 19A–25A). The court noted, however, that the nature and scope of any such discretion was not it (App. A, p. 31A, n. 36).

If the order of the court of appeals becomes final, allotments are made, and the power to control the rate of spending at the obligation stage is asserted, further litigation will follow. A court might then hold that the power to control the rate of spending was in fact at the allotment, not the obligation stage, contrary to this decision of the court of appeals. This would then leave the Administrator (assuming that allotments once made cannot be withdrawn) with no power to control the rate of spending at all, even though that other court would also have recognized that there was once such a power.

3. The legislative history shows that Congress intended to give the Administrator the withholding authority he exercised in this case. Congress passed the statute and repassed it over the President's veto after express assurances by those responsible for the legislation that the President would have power under the

statute to control the "rate of spending" by "impoundment." The Conference Committee deleted the word "all" before the word "Sums" from Section 205 (a) and added the phrase "not to exceed" in Section 207. Congressman Harsha, the House floor manager, said: "I want to point out that the elimination of the word 'all' before the word 'sums' in section 205(a) and insertion of the phrase 'not to exceed' in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending." 118 Cong. Rec. H9122 (daily ed., Oct. 4, 1972). The opinion of the court of appeals makes no effort to explain the import of these changes in the bill made by the Conference Committee. Because of these changes, the existence of this discretionary power to control the rate of spending through reduced allotment was conceded by the plaintiffs and accepted by the court of appeals in the companion case of *Campaign Clean Water, Inc.*, v. *Train*, C.A. 4, No. 73–1745 (App. B).

4. Should the allotment of funds be considered to limit the President's discretion over the rate of expenditure, as there is a danger it might, then an action to compel the allotment of authorized funds is barred by the doctrine of sovereign immunity. The defense of sovereign immunity was argued but not urged upon the court of appeals because of the decision of that court in *Scanwell Laboratories, Inc* v. *Shaffer*, 424 F. 2d 859 (C.A.D.C.) (App. A, p. 9A, n. 12).

Although this suit was nominally brought against the Administrator, in reality it is a suit against the sovereign because the requested relief will lead to the

expenditure of government funds. This Court has repeatedly held that sovereign immunity is a bar to actions where the relief sought involved the disposition of the government's own money or property. See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *City of Fresno* v. *California*, 372 U.S. 627; *Dugan* v. *Rank*, 372 U.S. 609; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371.

Land v. *Dollar*, 330 U.S. 731, held that where the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration," the suit is barred by sovereign immunity. *Id.* at 738. Although allotment does not directly require the expenditure of public funds, its ultimate effect is their expenditure. The decision below affects the ability of the Administrator to control the rate of spending under the program and hence "interfere[s] with the public administration."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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